IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-

74-5[illegible]4

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SUPREME COURT, U.S.

JOHN WESLEY HOOKS,

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered on October 17, 1974, rehearing denied, November 5, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at ___ Ga. ___, ___ S.E.2d ___ (1974) and is set out in Appendix A hereto, pp. 1a-11a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was entered on October 17, 1974, and is set out in Appendix A, hereto. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of rape under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the provisions for appellate review of death sentences established by the new Georgia capital punishment statute, Georgia Laws, 1973, pp. 159-172, Act. No. 74, violate the rights of an indigent defendant to the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States, and to the Due Process of Law and Equal Protection of the Laws guaranteed by the Fourteenth Amendment to the Constitution of the United States?

3. Whether petitioner's Sixth and Fourteenth Amendment rights to fair notice, confrontation, and an opportunity to defend his life in a capital sentencing proceeding were denied by the State's failure to provide him with a statutorily required notice, on which he was entitled to rely, that evidence of "aggravating circumstances" would be presented following his guilty plea to a charge of rape?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia:

Ga. Code Ann. § 26-2001

> "Rape. A person commits rape when he has carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex

organ. A person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years. No conviction shall be had for rape on the unsupported testimony of the female."

Ga. Code Ann. § 26-3102

"Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of a least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstances shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. § 27-2302 (1973)

"Recommendation to mercy. In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall mean imprisonment for life."

Ga. Code Ann. § 27-2514

"Sentence of death; copy for penitentiary-superintendent. Time and mode of conveying prisoner to penitentiary. Expenses.-Upon a verdict or judgment of death made by a jury or a judge, it shall be the duty of the presiding judge to sentence such convicted person to death and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be sent by the clerk of the court in which said sentence is pronounced to the superintendent of the State penitentiary, not less than 10 days prior to the time fixed in the sentence of the court for the execution of the same; and in all cases it shall be the duty of the sheriff of the county with one deputy or more, if in his judgment it is necessary, and provided that in all cases the number of guards shall be

approved by the trial judge, or if he is not available, by the ordinary of said county in which such prisoner is sentenced, to convey such convicted person to said penitentiary, not more than 20 days nor less than two days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by appeal, granting of a new trial, or other order of a court of competent jurisdiction, and the expense for transporting of said person to the penitentiary for the purpose of electrocution shall be paid by the ordinary of the county wherein the conviction was had, or the board of county commissioners, the county commissioner, or other person or persons having charge of the county funds, out of any funds on hand in the treasury of such county."

Ga. Code Ann. § 27-2534.1

"Mitigating and aggravating circumstances; death penalty.-(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the [statutory] aggravating circumstances enumerated in Code section 27-2534.1(a) is so found, the death penalty shall not be imposed."

Ga. Code Ann. § 27-2537

"Review of death sentences.-(a.-Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Georgia Laws, 1973, p. 162, Act No. 74

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty of pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

Georgia Laws, 1973, p. 171, Act No. 74

"Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment. Provided, however, that the judge of the superior court must find one of the statutory aggravating circumstances provided in Code section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking."

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia, entered on October 17, 1974, affirming petitioner's death sentence. Petitioner, John Wesley Hooks, a black man, pleaded guilty on December 10, 1973, in Cook County Superior Court to an indictment charging him with the rape of Mrs. Lucille Frances Jones, a white woman.[1/] Before the plea was accepted, the trial court examined petitioner[2/] and inquired whether petitioner had read the indictment and understood the charges against him, whether petitioner was agreeing to waive a jury trial and the presentation of witnesses against him, whether petitioner understood "that for the offense of Rape you can be sentenced to death in the electric chair," T. 2, despite any recommendation by the district attorney, whether petitioner was represented by counsel satisfactory to him, whether petitioner was entering the plea "freely and voluntarily" and not under the influence of any "promises or threats" or "force," T. 3, and whether petitioner committed the crime of rape and was guilty as charged, ibid. All answers were affirmative.

1/ Cook County Superior Court Indictment No. 9856 (Oct. 1, 1973). On the same date, petitioner was indicted for one count of kidnapping, Cook County Superior Court Indictment No. 9859; this indictment charged that petitioner did "abduct and steal away Lucille Frances Jones, a person, without lawful authority, and held such person against her will, and did commit bodily injury to her by having carnal knowledge of the said Lucille Frances Jones forcibly and against her will." As of this date, petitioner has not been tried on Indictment No. 9859.

2/ The complete transcript of the plea hearing is attached as Appendix B, supra.

After the court accepted the guilty plea, the State introduced the testimony of three witnesses, Mrs. Lucille Frances Jones and two deputy sheriffs who had investigated the crime. Mrs. Jones, a resident of Detroit, Michigan, testified that on July 13, 1973, she was driving on Interstate I-75 through Cook County, Georgia, when her right front tire blew out. She pulled over to the side of the road, tied a strip of bed sheet to her radio aerial, and unsuccessfully attempted to change the tire herself. She then decided to wait for assistance, and after about an hour, at approximately 9:00 p.m., a car containing petitioner and two other black males, John Wallace Eberheart and Eddie Dean Anderson, and an unidentified white male, stopped briefly and then left. A few minutes later, the same car returned with only the three black males in it. Mrs. Jones testified that, after the three had approached her car, Anderson said "there ain't no way we're going to help you, lady," T. 7, and petitioner and Eberheart began hitting her and kicking her, finally forcing her into their car. She testified that she wrestled and struggled with petitioner in the back seat as the car drove away:

> "I kept resisting and I kept fighting him, and he told me that 'I had better stop or he would kill me,' and he kept hitting me and hitting me and swearing at me. Finally, he got both his arms around my neck -- or, his hands around my neck, pushed them in the center of my neck and he told me, 'that if I moved again he would kill me' -- and then he tightened his grip and I couldn't breathe -- and I begged him to please let me breathe. He wouldn't.
>
> . . . .
>
> [After the car had travelled some distance away from the interstate highway and had stopped in a secluded wooded area] Anderson got out -- opened the car door -- and . . . [petitioner] said, 'get up you fucking honky bitch, get up,' and I couldn't get up he had

been hitting me so hard. Then, I tried very hard to get up; but, I was not successful. So, he hit me again and dragged me by the arm and my hair across the pavement. That action resulted in my pants being shredded on the highway -- and I was burned on my left thigh.

. . . .

He drug me into the woods and ripped off my clothes and started to raping me -- and did rape me.

. . . .

He penetrated my vaginal area with his penis.

. . . .

[H]e [then] lost his erection and started swearing -- and crawled up on me with his legs around my neck and said -- leaned over and said to me, 'I'm going to put my cock in your mouth and you will suck it or I will kill you' -- and he proceeded to do just that.

. . . .

And then he raped me again.
He got up -- pulled his pants up -- and spat on me.

. . . .

[H]is friends were coming back sort of coming toward the right -- and, as he was pulling his pants up he said, 'well, I'm done with this fucking honky bitch, who is next?' And he walked off to the right." (T. 8-9)

She testified that Anderson and Eberheart then raped her and that Eberheart committed oral sodomy upon her. The three men then released her, and she made her way to a farmhouse where she summoned the police and received medical treatment. As a result of her abduction,

> "I received a dislocated jaw. I had numerous oral and dental injuries -- a broken nose. Some internal stomach injuries. I had numerous lacerations, bruises. I had cuts all over my body. And I had a burn on my left thigh."

T. 11.

Deputy Sheriff James Lokey testified that he had seen Mrs. Jones at 11:00 p.m., on July 13, 1973, and that she was "hysterical" and appeared to have been "beat up." T. 16. Deputy J. W. Snead also testified that he saw Mrs. Jones at 11:45 p.m. that night at a hospital and that "[s]he was badly beaten up:"

> "Well, her left leg was bruised all up and down it; and, her left side; and her arms; and she had bites -- some kind of bites all over her shoulders and back. Her nose was swollen badly. And her lips were swollen out; and her right ear was badly swollen."

T. 18. He investigated the rape and found an earring and a sanitary napkin which she reported losing in a wooded area near a country road in Cook County.

The petitioner offered no evidence, and the trial court pronounced sentence:

> "Now, you having plead [sic] guilty, and after hearing the testimony in this case, I find that the offense of rape was outrageously violent, horrible, and that it involved torture to the victim. I further find the offense of rape was committed while you were in the commission of another capital felony, to wit: forcibly kidnapping the person of Lucille Frances Jones, and the said Lucille Frances Jones having received bodily injury.
>
> Therefore, it is the sentence of the Court that you be put to death by electrocution in the State Penitentiary, or such a place as the State Department of Corrections may direct, on a date to be fixed later."

T. 20-21.

On October 17, 1974, the Georgia Supreme Court, with one Justice dissenting on the ground that the Georgia capital punishment statute was unconstitutional, affirmed petitioner's death sentence. The Court denied rehearing on November 5, 1974, with

one Justice dissenting. 3/

3/ Mr. Eddie Dean Anderson was convicted and sentenced to death after a jury trial in Cook County Superior Court for the rape of Mrs. Jones on October 9, 1973, but his motion for a new trial was partially granted, and a new sentencing hearing was ordered by the trial court. State v. Anderson, Cook County Superior Ct. No. 9854 (Oct. Term 1973). This resentencing hearing has not yet been held, and the case is presently pending in Cook County Superior Court.

Mr. John Wallace Eberheart was convicted of both the rape and the kidnapping of Mrs. Jones after a jury trial on December 10, 1973, and received a sentence of death on each conviction. The Georgia Supreme Court affirmed the convictions and death sentences with one Justice dissenting, Eberheart v. State, 232 Ga. 247, 206 S.E.2d 12 (1974), rehearing den. May 21, 1974, and this case is now pending before the Court on a petition for certiorari. Eberheart v. Georgia, No. 74-5174 (filed August 19, 1974).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. After sentence was pronounced, petitioner moved for a new trial and to vacate sentence on the grounds, inter alia, that the death penalty imposed upon him constituted cruel and unusual punishment under the Eighth Amendment to the Constitution of the United States. This motion was denied by the trial court. In the Supreme Court of Georgia, petitioner's Enumeration of Error I(c) alleged that denial of this motion was error "[b]ecause said sentence constitutes cruel and unusual punishment which is illegal under the laws and the Constitution of the State of Georgia and of the United States." The Eighth Amendment contention was briefed and rejected by a majority of the Supreme Court. Hooks v. State, Ga. Sup. Ct., No. 27103, slip op. at 6 (Oct. 17, 1974) (App. A., infra, at 6a). Petitioner again raised the issue in ¶ 1 of his petition for rehearing, but this petition was denied.

2. In support of a timely rehearing petition in the Georgia Supreme Court, petitioner urged the following grounds:

> "2. The standard of appellate review utilized by this Court in this case (and see Coley v. State, ___ Ga. ___, 204 S.E.2d 612 (1974); House v. State, ___ Ga. ___, 205 S.E.2d 217 (1974); Eberheart v. State, ___ Ga. ___, 206 S.E.2d 12 (1974)) magnifies the unconstitutionality of the new Georgia capital punishment statute under Furman v. Georgia, supra, since this standard utilizes some of the very pre-Furman cases in which the death penalty was found to be "freakish" 408 U.S. at 310 (opinion of Mr. Justice Stewart) and "arbitrary" 408 U.S. at 256 (opinion of Mr. Justice Douglas) in Furman. This reliance on an unconstitutional standard perpetuates the error originally condemned by the United States Supreme Court. See Lane v. Wilson, 307 U.S. 268 (1939).
>
> 3. Furthermore, the standard of appellate review utilized by this Court under the new Georgia capital punishment statute is so arbitrary and defective as to violate the Due Process

and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, see Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Reed v. Reed, 404 U.S. 71 (1971) in that it considers only those cases in which a conviction was appealed. A standard which uses only appellate cases as a basis for comparison ignores all of the rape cases in which plea bargaining occurred and a plea of guilty was accepted for a lesser offense or for a sentence of less than death for rape and all those cases in which a life sentence was imposed and no appeal was taken.

. . . .

5. Since its standard of appellate review requires the Court to analyze the "evidence and sentence . . . [in] previous cases" and to consider the "factual situations and . . . aggravating circumstances" in previous cases, Coley v. State, ___ Ga. ___, 204 S.E.2d 612, 616-617 (1974), appellant is denied both equal protection and due process of law under the Fourteenth Amendment to the United States Constitution, see Griffin v. Illinois, 351 U.S. 12 (1956), since he is unable, as an indigent, to obtain the records in the cases which this Court is using as a standard of review. The appellate reports of these cases, which are available to appellant, frequently do not dislcose the factual circumstances of the conviction and sentence, and provide an inadequate basis of comparison.

6. For the reasons described in Paragraph 5, supra, appellant is also deprived of the effective assistance of counsel guaranteed by the Sixth Amendment of the Constitution of the United States, since the procedures whereby the Court affirms or vacates a death sentence deny indigent death-sentenced defendants the effective assistance of "counsel acting in the role of an advocate," Anders v. California, 386 U.S. 738, 743 (1967) on the question of life or death. See Douglas v. California, 372 U.S. 353 (1963); Powell v. Alabama, 287 U.S. 45 (1932)."

The rehearing petition was denied.

3. Petitioner's Enumeration of Error 3 alleged "That error was committed when the State presented evidence in the sentencing phase of the trial without giving prior notice to . . . [petitioner] which evidence State intended to use." Petitioner's brief in the Georgia Supreme Court argued that this failure by

the State to give notice of evidence in aggravation which would be introduced at the sentencing hearing resulted in petitioner's being deprived of "the time . . . [and] . . .means in which to prepare a proper cross-examination and rebut said evidence in a manner deserving and consistent with a capital felony charge," Brief of Appellant, Hooks v. State, Ga. Sup. Ct. No. 29103, at 9, and that "such failure to give . . [petitioner] a notice is a denial of . . . [petitioner's] rights of equal protection and due process of law." Id. at 10. The Supreme Court rejected this contention. Hooks v. State, Ga. Sup. Ct. No. 29103, slip op. at 5 (Oct. 17, 1974) (App. A., infra, at 5a).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE UNDER THE LAW OF GEORGIA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PROVISIONS FOR APPELLATE REVIEW OF DEATH SENTENCES ESTABLISHED BY THE NEW GEORGIA CAPITAL PUNISHMENT STATUTE, GEORGIA LAWS, 1973, PP. 159-172, ACT NO. 74, VIOLATE THE RIGHTS OF AN INDIGENT DEFENDANT TO THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND TO THE DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Certiorari to the Supreme Court of Georgia, Eberheart v. Georgia, No. 74-5174, at pp. 19-58. 4/

Since the certiorari petition in Fowler v. North Carolina, No. 73-7031, was filed on July 9, 1974, 84 additional persons have been sentenced to die in this country, making a national total of 205 persons presently condemned to death as a result of sentences imposed subsequent to Furman v. Georgia, 408 U.S. 238 (1972). In Georgia, 25 persons have been sentenced to death under Georgia's post-Furman capital punishment statute, and the Georgia Supreme Court has now affirmed death sentences imposed on seven

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4/ This portion of the Eberheart certiorari petition is attached as Appendix C.

defendants.[5/]

5/ In addition to petitioner's case, the Georgia Supreme Court has affirmed death sentences in the following cases: Eberheart v. State, 232 Ga. 247, 206 S.E.2d 12 (1974), pending on petn. for cert. sub nom. Eberheart v. Georgia, No. 74-5174 (filed Aug. 19, 1974); House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), pending on petn. for cert. sub nom. House v. Georgia, No. 74-5196 (filed Aug. 23, 1974); Floyd v. State, Ga. Sup. Ct. No. 29315 (Nov. 26, 1974); McCorquodale v. State, Ga. Sup. Ct. No. 29131 (Dec. 3, 1974); Gregg v. State, 233 Ga. 117, __S.E.2d __(Oct. 17, 1974), rehearing denied, Oct. 29, 1974); Ross v. State, Ga. Sup. Ct. No. 29083 (Nov. 18, 1974), rehearing denied, Dec. 17, 1974). Mr. Justice Gunter dissented in each of these cases on the grounds of the unconstitutionality of the new Georgia death-sentencing procedure. See, e.g., Gregg v. State, supra, 233 Ga. at 129-130:

> "I dissent because it is my view that Georgia's death penalty statutes are unconstitutional. See the concurring part of my concurring and dissenting opinion in Coley v. State, 231 Ga. 829.
>
> Also, 1974 enactments by the Georgia General Assembly on this subject are as follows: "In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge." Ga. L. 1974, p. 353. And, "in all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in Code Ann. § 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law." Ga. L. 1974, p. 357.
>
> I conclude that these 1974 enactments by the Georgia General Assembly expressly place discretion in the sentencing fact-finder to impose or not impose the death penalty in any case. And this is what I understand to be constitutionally impermissible under the decision of the Supreme Court of the United States in Furman v. Georgia, 408 U.S. 238 (92 SC 2726, 33 LE2d 346).
>
> I respectfully dissent."

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO FAIR NOTICE, CONFRONTATION, AND AN OPPORTUNITY TO DEFEND HIS LIFE IN A CAPITAL SENTENCING PROCEEDING WERE DENIED BY THE STATE'S FAILURE TO PROVIDE HIM WITH A STATUTORILY REQUIRED NOTICE, ON WHICH HE WAS ENTITLED TO RELY, THAT EVIDENCE OF "AGGRAVATING CIRCUMSTANCES" WOULD BE PRESENTED FOLLOWING HIS GUILTY PLEA TO A CHARGE OF RAPE.

Section 1 of the 1973 Georgia capital punishment statute, Ga. Laws, 1973, p. 162, Act No. 74, amending Ga. Code Ann. §27-2534, establishes a bifurcated proceeding in capital cases. It provides for separate, successive determinations of guilt and sentence, and expressly guarantees "that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible" at the sentencing stage. 6/

6/ Georgia Laws, 1973, p. 162, Act No. 74, is quoted in its entirety at pp. 7-8, supra. After petitioner's sentence was imposed but before the Georgia Supreme Court affirmed his sentence, this provision was repealed in its entirety by Ga. Laws, 1974, pp. 355-358, Act No. 854 (approved March 20, 1974), and a new provision, Ga. Code §27-2503, was substituted. Subsection (a) of Ga. Code §27-2503 reenacts without change the provision of Ga. Laws 1973, p. 162, Act No. 74, guaranteeing a capital defendant advance notice of any "evidence in aggravation" which the State will introduce at the sentencing hearing:

> "(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of 'guilty' by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas; Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as

Petitioner here was given no notice that "evidence in aggravation" would be introduced after his guilty plea was accepted. However, the State presented three witnesses who testified in detail concerning the brutality of the crime to which he had pleaded guilty. After making findings based upon this evidence, the trial judge sentenced petitioner to death.

The Supreme Court of Georgia rejected petitioner's contention that the failure by the State to give notice was a prejudicial constitutional error, ruling that "[a] review of the hearing transcript shows that the state's evidence was introduced solely to present to the trial judge a complete set of facts on the rape charge to enable the court to insure that

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6/ cont'd.

> provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in Code section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

Georgia Laws, 1973, p. 171, Act No. 74, provides that a trial judge may sentence to death "in his discretion" a capital defendant who pleads guilty "[p]rovided, however, that the judge of the superior court must find one of the statutory aggravating circumstances provided in Code section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking."

defendant's plea of guilty was not improvidently entered." (Slip op. at 5, p.5 infra.) [7] But the transcript of this proceeding, which is relatively brief and is attached as Appendix B, simply does not support this characterization. This record clearly indicates that the plea of guilty was entered and accepted before the three witnesses were heard.

The trial judge examined petitioner in detail as to petitioner's understanding of the charge against him and then asked, "Understanding all your right[s], do you want to enter a plea of guilty to this offense?", whereupon petitioner answered, "Yes, sir," and signed a formal statement pleading guilty. T.2. Sentence was not pronounced at this time, however, and the trial

---

7/ In support of its ruling, the Court quotes (slip op. at 5, p.5a infra) its recent decision in Eberheart v. State, 232 Ga.247, 206 S.E.2d 12, 17 (1974): "[t]he bifurcated trial was created to withhold matters inadmissible on the issue of guilt or innocence from the jury until that issue had been determined. The statute is clear that the pre-sentence hearing is for additional evidence and in no way excludes from consideration on sentence the matters heard on the issue of guilt or innocence." The applicability of this statement to petitioner's case is utterly unclear, for Eberheart was a case in which a defendant was tried before a jury and convicted for rape and kidnapping; neither the State nor the defendant introduced any evidence at the sentencing hearing, and the jury imposed the death sentence on the basis of the evidence introduced at the guilt-innocence stage. On appeal, the defendant contended that the new Georgia capital punishment statute required discrete evidentiary demonstrations on the separate issues of guilt and sentence, a claim rejected by the Georgia Supreme Court in the language quoted above.

judge announced: "I will complete this later. This will be completed later on this afternoon, when, if they wish, they can introduce any evidence they might wish to in the case." T.4.

When the case was reopened a few hours later, the State announced, "We have some witnesses," T. 5, and proceeded to present the testimony of three persons. There was no statement as to why this testimony was being offered or received, and there is not the slightest hint in the record that the trial judge was seeking to ascertain the factual basis for the already-accepted guilty plea. After hearing the three witnesses, the judge did not announce that he was accepting petitioner's guilty plea; nor did he make any findings, statements, or references regarding the acceptability of the plea that he had already taken earlier in the afternoon before the sentencing evidence was presented. Rather upon, determining that the defense had no evidence "in answer" to present, and that the petitioner himself had nothing "that you would like to say to the Court <u>before I complete the sentence in this case</u>" (T. 20)(emphasis added), the judge proceeded immediately to make the findings concerning "aggravating circumstances" required by the 1973 Georgia capital punishment statute and pronounced the death sentence:

> "Now, you having plead [sic] guilty, and after hearing the testimony in this case, I find that the offense of rape was outrageously violent, horrible, and that it involved torture to the victim. I further find the offense of rape was committed while you were in the commission of another capital felony, to-wit: forcibly kidnapping the person of Lucille Frances Jones, and the said Lucille Frances Jones having received bodily injury.

> Therefore, it is the sentence of the Court that you be put to death by electrocution in the State Penitentiary, or such a place as the State Department of Corrections may direct, on a date to be fixed later."

T. 20-21.

The Supreme Court of Georgia therefore "has not affirmed . . . [this] convictio[n] on the basis of the trial petitione[r] . . . [was] afforded." Cole v. Arkansas, 333 U.S. 196, 201 (1948). Petitioner is "entitled to have the validity of . . . [his] convictio[n] appraised on consideration of the case as it was tried and as the issues were determined in the trial court." Id. at 202. He was clearly subjected to a sentencing hearing under the 1973 Georgia capital punishment statute, and he was clearly not given the notification guaranteed by that statute of the "evidence in aggravation" which the State introduced against him. The question presented is whether this error violated petitioner's federal due process rights.

"The right of an accused in a criminal trial to due process of law is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). "[A]lthough the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . it does speak to the balance of forces between the accused and his accuser." Wardius v. Oregon, 412 U.S. 470,474 (1973). No question is presented here of the nature or amount of discovery which a State is constitutionally

obligated to afford a defendant in a criminal case. Cf. Wardius v. Oregon, supra, 412 U.S. at 475. The question instead is whether, when a State has explicitly provided for discovery procedures and has said on the face of the applicable sentencing statute that only evidence previously revealed to a defendant may be used against him for sentencing purposes, it is a denial of fundamental fairness for the State suddenly to present unannounced evidence in support of a death sentence.

Surely, petitioner was entitled to rely upon the statute and to expect no evidence to be presented without the statutory notice. Raley v. Ohio, 360 U.S. 423 (1959), holds as much. In that case, a state Un-American Activities Commission investigating subversive activities had assured witnesses appearing before it that they had a right to claim a privilege against self-incrimination. The witnesses were later prosecuted and convicted for contempt on account of their having claimed the privilege. The Ohio Supreme Court affirmed their convictions on the ground that the witnesses were presumed to know that a state immunity statute deprived them of any right to claim the privilege against self-incrimination before the Commission and obligated them to testify. But this Court held that, since the practical effect of the Commission's assurances was "to deceive" the witnesses, the judgment of the Ohio Supreme Court violated the Due Process Clause of the Fourteenth Amendment.

> "After the Commission, speaking for the State, acted as it did, to sustain the Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the State -- convicting a citizen for exercising a privilege which the State had clearly told him was available to him."

Id. at 425-426. Thus, the State's "active misleading" of a party in the course of a formal hearing, was held to be fundamentally unfair. Id. at 438. Cf. Manness v. Meyers, __U.S.__, 43 U.S.L.W. 4143, 4151-4152 (January 15, 1975)(concurring opinion of Mr. Justice White).

Similarly, in this case,"petitioner cannot be faulted for taking the legislature at its word." Wardius v. Oregon, supra, 412 U.S. at 478 (footnote omitted). He was misled and prejudiced by the prosecution's failure to provide him with the statutorily promised notice, since his counsel was thereby disabled from investigating the State's evidence before the sentencing hearing and preparing to meet it. Until the hearing was under way, petitioner was unaware of any need to defend against evidence presented by the State. He had elected to plead guilty. The indictment to which he pleaded charged simply the crime of rape; it did not specify any statutory "aggravating circumstances" for which the death penalty could be sought. In this manner, petitioner was deprived of that "reasonable notice of the charges against him" which is an indispensable element of due process. In re Oliver, 333 U.S. 257, 273 (1948); Cole v. Arkansas, supra, 333 U.S. at 201. His ability to cross-examine the State's witnesses effectively

was severely impaired.[8] And he was unfairly denied the opportunity to prepare to meet the State's evidence with evidence of his own.[9] The result was a palpable deprivation of "an opportunity

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8/ "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation and helps assure the 'accuracy of the truth-determining process.' . . . It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' . . . [I]ts denial or significant dimunition calls into question the ultimate '"integrity of the fact-finding process."'"

Chambers v. Mississippi, 410 U.S. 284, 295 (1973). See also Pointer v. Texas, 380 U.S. 400, 405 (1965); Dutton v. Evans, 400 U.S. 74, 89 (1970); Bruton v. United States, 391 U.S. 123, 135-137 (1968).

9/ "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Washington v. Texas, 388 U.S. 14, 19 (1967). See also Chambers v. Mississippi, supra, 410 U.S. at 302; Webb v. Texas, 409 U.S. 95, 98 (1972).

to be heard in his defense -- a right to his day in court," In re Oliver, 333 U.S. 257, 273 (1948), on the issue of life or death.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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OCTOBER TERM, 1974

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JOHN WESLEY HOOKS,

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v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

Each of the three men, who raped Mrs. Lucille Frances Jones in Cook County, Georgia, on July 13, 1973, has been sentenced to death. Eddie Dean Anderson and John Wallace Eberheart were convicted and sentenced by juries. Anderson's appeal was remanded for procedural reasons, and he has been granted a new trial for re-sentencing only. Anderson v. State, No. 28780 (Ga.S.Ct., April 8, 1974), remanding No. 9854 (Cook County, Ga. Superior Court, October Term, 1973). Eberheart's conviction was affirmed in 232 Ga. 247, 206 S.E.2d 12 (1974), and he has applied for a writ of certiorari. Eberheart v. Georgia, No. 74-5174 (filed August 19, 1974).

After the trials of his co-defendants, petitioner pleaded guilty, and he also received the death sentence. The Georgia Supreme Court affirmed, 233 Ga. 149, _____ S.E.2d _____ (1974),

and this petition for a writ of certiorari has followed.

The rape was brutal and barbaric, and its character was determined by petitioner's example. He was the one who initially struck Mrs. Jones after he and his companions came to the secluded spot where her tire had blown out. (T. 5-7). (Petitioner's Exhibit B). He choked her and threatened her life when she fought back inside the car as they abducted her. (T. 7). At the rape scene, when Mrs. Jones could not get out because of the beating, petitioner dragged her by the hair across an asphalt road so roughly that her pants shredded and her leg was burned. (T. 8).

It was petitioner, who ripped Mrs. Jones' clothing off and first raped her. (T. 8-9). When he lost his erection, he crawled up on her neck and forced her to revive it orally. (T. 9). After raping her again, he let his co-defendants, Eberheart and Anderson, follow his example. (T. 9-10).

The three men abandoned Mrs. Jones in the woods. The rape had occurred during her menstrual cycle. She suffered a dislocated jaw, numerous oral and dental injuries, a broken nose, internal stomach injuries, a burned thigh, lacerations and bruises. She had been raped in a bed of red ants called "cowboy" ants and suffered bites all about her shoulders and back. (T. 10-11, 18-19).

Petitioner's responsibility for the crime is admitted by his plea of guilty, whose voluntary and knowing nature is shown affirmatively on the record and has not been questioned at any stage of review. Instead, in seeking a writ of certiorari from this Court, petitioner advances the arguments for death sentence review already presented by his co-defendant Eberheart in his petition, and, in addition, petitioner Hooks contends he was denied Due Process, under his reading of the

Georgia death statute, by the State's omission of a notice of aggravating circumstances, which it intended to prove.

REASONS FOR NOT GRANTING THE WRIT

I. THE SENTENCE OF DEATH DID NOT VIOLATE THE EIGHTH AMENDMENT PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT. (Question 1).

In Exhibit C, petitioner incorporates reasons for granting Eighth Amendment review presented by his co-defendant, Eberheart, in no. 74-5174 (filed August 19, 1974). Brief for Petitioner, 17. Respondent also continues to rely upon his brief in opposition in that case and further supplements his opposition to the grant of certiorari as follows.

On the merits, the Eighth Amendment argument is three-fold: Any death sentence is cruel and unusual by contemporary standards; if not, any death sentence for rape is so excessive it is cruel and unusual; finally, if death may be imposed, its imposition here occurred under the procedures which permit "its arbitrary, rare and discriminatory use," contrary to the teaching of Furman v. Georgia, 408 U.S. 238 (1972). Brief for Petitioner, App. 1c ff, 29c, 30c.

The threshold reason proffered for granting review of these contentions by writ of certiorari is itself an implicit inroad into the argument on the merits. Although contending that contemporary community standards render capital punishment cruel and unusual, petitioner acknowledges in urging review that Georgia is not alone in continuing to authorize death sentences after Furman. Brief for Petitioner, 17-18; 28c.

Indeed, most American jurisdictions have done so. Note, 87 Harv. L. Rev. 1690, 1691 (1974). Therefore, it is common starting ground for petitioner and respondent that since Furman a number of persons have been found by their contemporaries to merit death as lawful punishment.

It is also common starting ground that there have been two general approaches to compliance with Furman by the majority group of American jurisdictions, just described, who currently authorize capital punishment: On the one hand are statutes which make death mandatory when authorized, and on the other hand are statutes which allow controlled discretion. Brief for Petitioner, 28c; see also Note, 87 Harv. L. Rev. 1690, 1691-1692, 1699 (1974)(identifying four basic approaches along a line with mandatory and discretionary end points). Respondent also agrees with petitioner that Georgia is among those jurisdictions which authorize discretion.

The point of departure is in petitioner's claim to have demonstrated compelling grounds for granting review. As just demonstrated, the claim itself acknowledges a post-Furman reaffirmation of capital punishment. The claim also mischaracterizes the particular means of reaffirmation in Georgia: As written and construed, the Georgia procedures are not arbitrary and discriminatory, and the petition does not create substantial doubt that they are within what should be the ultimate distillation of the teaching in Furman.

Furman does not hold that the death sentence is per se unconstitutional. Nor does Furman hold that a particular statutory vehicle must be the means by which death is imposed. Instead, Furman is result-oriented. The opinions examine not statutes but what had happened in their implementation.

Respondent respectfully suggests that the holding in Furman may be stated as the following, constitutionally required result under any capital procedure: Isolated defendants cannot be sentenced to die on the basis of chance or arbitrariness or impermissible social attitudes. The statute must be applied in such a way that there is a meaningful pattern of death sentence imposition.

As written and construed, Georgia procedures satisfy this criterion. Under the 1973 statute, once guilt is determined on a capital charge, there are ten "statutory aggravating circumstances," one of which, at least, must be present beyond reasonable doubt before death can be imposed. Ga. Laws 1973, p. 159, 162, 164-166, 170-171, amended, in part, without material change, Ga. Laws 1974, pp. 352, 355-358 [Ga. Code Ann. §§ 26-3102, 27-2503 (formerly-2534.1), - 2534, - 2537 (Supp. 1974)]. The statutory aggravating circumstance is a procedural prerequisite to death sentence imposition: Its presence beyond reasonable doubt does not mandate a death sentence.

If death is imposed, there is a second level set of guidelines by which the Supreme Court of Georgia reviews the sentence. Ga. Code Ann. § 27-2537, supra. These standards have been paraphrased by the Georgia Supreme Court as follows:

> "Whether the sentences of death were imposed under the influence of passion, prejudice or any other arbitrary factor;[1]

---

[1] The scope of this guideline is illustrated by Prevatte v. State, No. 29419 (Ga. S.Ct. Feb. 25, 1975), which reverses on a ground of improper prosecutorial argument which had not been the subject of a trial-level issue and would not have been preserved for review in a conventional case. Respondent's Exhibit A. See also Respondent's Exhibit B, Stack v. State, No. 29324 (Ga. S.Ct., Mar. 18, 1975).

> whether the evidence supports the jury's finding of a statutory aggravating circumstance; and whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant...." Floyd v. State, 233 Ga. 280, 284,_____ S.E. 2d _____(1974).

Like the statutory aggravating circumstance at the trial level, these standards of review place procedural barriers in the way of imposition of death, not the nonimposition. The precise issue, then, which petitioner would place before the Court is whether the Eighth Amendment forbids the Georgia statute, whose discretionary guidelines control the imposition of death with clear and objective standards but at no point require a death sentence. In terms of the suggested holding of Furman, the question for consideration of the application for certiorari is whether the petition raises the question that the statute has resulted, and will result, in a non-meaningful pattern of death sentence imposition, one due to chance, arbitrariness and impermissible social practice.

Primarily, but not alone, through its review for disproportionate sentences, the Georgia Supreme Court has seen to the implementation of the Georgia statute in the required, neutral and meaningful pattern. The Court has construed its "duty

> under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally

and not 'wantonly and freakishly imposed...." Moore v. State, No. 29278 (Ga. S.Ct., Feb. 12, 1975)(p. 6-7). (Emphasis added). Respondent's Exhibit C.

Review for disproportionality has resulted, for all practical purposes, in elimination of the death sentence for armed robbery. Floyd v. State, 233 Ga. 280, S.E. 2d (1974); Gregg v. State, 233 Ga. 117, S.E. 2d (1974). Rape and probably kidnapping will require particularly pathetic circumstances. Compare Coley v. State, 231 Ga. 829, 204 S.E. 2d 612 (1973) with Eberheart v. State, 232 Ga. 247, 206 S.E. 2d 12 (1974). The classic death sentence will be one for senseless murder. See e.g., Gregg, supra; House v. State, 232 Ga. 140, 205 S.E. 2d 217 (1974).

By its own terms, the Georgia procedure is self-contracting -- but not arbitrarily so. All members of the death sentence groups of whatever size will be perpetrators of crimes, whose circumstances generally brought death for those to blame. This approach construes the pre-Furman problem not to have been that isolated members of the group deserving of death escaped it but instead to have been that isolated members of the group did not escape it.

Assuming arguendo his membership in the group is not arbitrarily determined, petitioner nevertheless urges that contemporary community mores so patently reject capital punishment, at least for rape, that the Court should entertain his plea that it is prohibited by the Eighth Amendment as cruel and unusual, on that ground. But his membership is in a group determined by the Georgia Supreme Court to be one whose members will generally be found by petitioner's contemporaries to be deserving of death.

Petitioner cites other jurisdictions for the non-authorization of capital punishment for rape and kidnapping. Petitioner would not be under sentence of death had he merely raped Mrs. Jones. Other jurisdictions aside, he has not demonstrated reason to believe that he can show that current American attitudes cause the Eighth Amendment to prevent deterring a man with death should he ever contemplate beating a stranded woman, dragging her across a road by the hair, and straddling her neck for the oral stimulation he needs to rape her once again in a bed of ants.

II. PETITIONER DID NOT MAKE A SEASONABLE PRESENTATION OF HIS CONTENTION THAT THE GEORGIA PROCEDURE FOR DETERMINING DEATH SENTENCE PROPORTIONALITY DENIES HIM DUE PROCESS, EQUAL PROTECTION UNDER THE LAW, AND THE EFFECTIVE ASSISTANCE OF COUNSEL. (Question 2).

As did petitioner in Eberheart, petitioner here attacks the procedure by which the Georgia Supreme Court reviews death sentences to determine whether they are disproportionate or excessive, considering both the crime and the defendant. This attack is in a sense apart from the alleged role of the review mechanism in preserving the arbitrary and discriminatory imposition of capital punishment. Proceeding under the Due Process and Equal Protection clauses, and the right to effective assistance of counsel, petitioner argues that only men of means can study other cases to argue their sentence is disproportionate and that for all defendants, it is unclear which cases the Georgia Supreme Court considers and under which standards of comparison.

This is a federal question raised for the first time in the Georgia Supreme Court by way only of motion for rehearing. This was an untimely presentation and ineffective in preserving the issue for review by writ of certiorari. See Bohannan v. Arizona, 389 U.S. 1 (1967); Herndon v. Georgia, 295 U.S. 441 (1935); Jett Bros. Distillation Co. v. Carrollton, 252 U.S. 1 (1920).

The gravamen of petitioner's contention here is that the answers to questions he has about the appellate mechanism "are all unknown and unknowable." Petitioner's Exhibit 32c. On the present record of petitioner, the answers to such questions may be speculative. But that is not to say that the answers to such questions cannot be developed upon a proper record, see Ross v. State, 233 Ga. 361, 364-367, _____ S.E.2d _____ (1974), and since the answers can be ascertained with certainty, there is no reason to decide this issue on the basis of speculation.

III. PETITIONER MISCONSTRUES THE GEORGIA DEATH STATUTE IN CONTENDING THAT HE WAS DEPRIVED OF A REQUIRED NOTICE OF AGGRAVATING CIRCUMSTANCES AND THE RECORD DOES NOT SUPPORT HIS CONTENTION THAT FORMAL LACK OF NOTICE WAS A DENIAL OF DUE PROCESS. (Question 3).

Georgia law requires that the finder of fact in a capital case determine beyond reasonable doubt that certain, "statutory" aggravating circumstances are present before the sentence of death may be imposed. Ga. Code Ann. §§ 26-3102, 27-2528, -2534 (now 27-2503), 27-2534.1. Georgia law also provides that the State may introduce "evidence in aggravation" for the purpose of determining the sentence in a criminal trial just as a defendant may also introduce evidence in mitigation. Ga. Code Ann.

§ 27-2534 (now § 27-2503). Petitioner's construction of Georgia law equates "statutory aggravating circumstances" with "evidence in aggravation" and that construction is contrary to the interpretation of the Georgia Supreme Court. Moreover, petitioner's construction is not so obviously correct that he can contend that he was entitled as a matter of due process to rely upon it. Nor has he established a record to support his contention of prejudice.

Under the Georgia procedures for capital punishment, petitioner's guilty plea occurred in the following context:

> "Any person who has been indicted for an offense punishable by death may enter a plea of guilty . . . and the judge . . . may, in his discretion . . . sentence such person . . . to any punishment authorized by law. . . . Provided, however, that the judge of the Superior Court must find one of the statutory aggravating circumstances provided in Code section 27-2534.1 before imposing the death penalty. . . ." Ga. Laws 1973, pp. 159, 171 [Ga. Code Ann. § 27-2528 (Supp. 1974)].

The aggravating circumstances are listed in Code section 27-2534.1, which itself also contains a requirement that a finding of an aggravating circumstance precede an imposition of death. Ga. Laws 1973, pp. 159, 164, 165.

A similar requirement is in effect for bench trials and jury trials. Ga. Laws 1973, pp. 159, 162, 170, as amended, without substantial change, Ga. Laws 1974, 352, 356, 357 [Ga.

Code Ann. §§ 26-3102, 27-2534, now 27-2503.] Section 27-2534 preceded the death sentence procedures and in fact is the matrix for the bifurcated trial in Georgia.

In describing the punishment phase of the trial, the bifurcated trial provisions indicate the following:

> "In such hearing (punishment phase), subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible." Ga. Laws 1973, pp. 159, 162 [formerly Ga. Code Ann. § 27-2534].

As amended by the death statute, this provision does go on to provide that:

> "In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code section 27-2534.1 shall be followed." Id.

Prior to petitioner's appeal, the Georgia Supreme Court, in jury trial cases, had considered the question whether notice of

statutory aggravating circumstances was a prerequisite to imposition of a death sentence. On the rationale that the purpose of a bifurcated trial is to withhold "matters inadmissible on the issue of guilt or innocence from the jury until that issue has been determined," the Georgia Supreme Court held that notice of statutory aggravating circumstances is not necessary for matters heard on the question of guilt or innocence. Eberheart v. State, 232 Ga. 247, 253, 206 S.E.2d 12 (1974); cf. Ford v. State, 232 Ga. 511, 512-13 (1), _____ S.E.2d _____ (1974). Thus, even without deciding whether a notice of any conventional, aggravating circumstance is required in a guilty plea case, the Georgia Supreme Court simply took the next logical step on the basis of these cases in petitioner's case and held that that notice was not required when the trial court was simply informing itself of the circumstances of the case.

The construction given a state statute by the highest court of the state is, of course, authoritative. Wainwright v. Stone, 414 U.S. 21 (1973); Elmendorf v. Taylor, 23 U.S. 152, 159-160 (1825). Petitioner, however, would qualify this proposition with his contention that he was entitled to take "the legislature at its word." Brief for Petitioner, 25, citing Wardius v. Oregon, 412 U.S. 470, 478 (1973). However, while an attorney examining Section 27-2534 might argue the position urged here by petitioner, his position is not so obviously correct as he puts it, and it was not "unforeseeable" to an attorney studying the statutory framework that the Georgia Supreme Court would find the notice requirement inapplicable to statutory aggravating circumstances, at least where they concern the events of the crime itself. See Bouie v. City of Columbia, 378 U.S. 347, 351-352 (1964).

The fact that petitioner's two co-defendants preceded him to jury trials, and the transcript of petitioner's guilty plea hearing, attached to his petition, refute his contention of

prejudice. The court unequivocally told petitioner that his guilty plea could result in a death sentence. Petitioner's Exhibit 1b, 2b. The court made it clear that its recess was for the purpose of taking further evidence. Petitioner's Exhibit 2b. Yet the record is devoid of a request for a continuance or even an objection to the State's evidence. Nor does the transcript of the hearing reflect surprise or objection to the sentence of death announced by the court. The first objection came by way of motions to vacate the judgment and grant a new trial. If petitioner's attorney was indeed so unfamiliar with the evidence of the State on the question of guilt or innocence, so that his cross-examination of witnesses was hampered, then this is a serious contention going to the validity of the guilty plea itself and requiring factual development which cannot be handled expeditiously in any other way than by writ of habeas corpus.

CONCLUSION

The Court should refuse to grant the writ of certiorari because no sufficient reason for review has been set forth by petitioner Hooks.

Respectfully submitted,

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